(1)

Supreme Court, U.S.
FILED

941159 DEC 28 1994

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JEFFREY P. CURTIS
PETITIONER,
VS.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETER B. KELLER
115 W. WASHINGTON ST.
TUCSON, AZ 85701
(602) 622-3909
ATTORNEY FOR PETITIONER

76pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether The District Court Clearly Erred in Finding That the Appellant had not Accepted Responsibility.....

II. Whether The District Court Clearly Erred in Admitting Hearsay Evidence that did not Meet the "In Furtherance" Element of the Test for Establishing the "Co-Conspirator Exception" to the Hearsay Rule.....

III. Whether The Evidence Proved The Existence of a Single Conspiracy as Alleged in the Indictment.....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JEFFREY P. CURTIS
PETITIONER,
VS.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, JEFFREY PAUL CURTIS, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 29, 1994.

TABLE OF CONTENTS AND AUTHORITIES

Kotteakos v. United States, 328 U.S. 750 (1946) 50

United States v. Eubanks, 591 F.2d 513 (9th Cir., 1979) 56

United States v. Gomez, 24 F. 3rd 924 (7th Cir., 1994) 38,40,42,44

United States v. Johnson, 956 F.2d 894, 15 F3rd ATt 850 43

United States v. McKinney, 15 F3rd 849 (9th Cir. 1994) 42

United States v. Wood, 834 F.2d 1382 (8th Cir., 1987) 56

STATUTES

18 U.S.C. §§1291 and 3742 9

18 U.S.C. §1956 7

21 U.S.C. §§841 & 846 6

OPINION BELOW

The opinion below was reported at 37 F3rd 301(7th Cir.,1994). A copy is attached as Appendix A.

JURISDICTION

This Court has jurisdiction by virtue of Section 1254(1) of the United States Code. The opinion herein was filed on September 29, 1994.

STATEMENT OF THE CASE

I. Procedural Statement

The Petitioner, Jeffrey Paul Curtis (hereinafter "Mr. Curtis"), was indicted on February 5, 1993, in Case No. CR-93-4006, filed in the Rock Island Division of the United States District Court for the Central District of Illinois. The Indictment charged him with conspiracy to distribute marijuana in violation of 21 USC §§841 & 846, and with money

laundering in violation of 18 USC §1956.

On May 3-6, 1993, the case was tried in Rock Island, Illinois, before the Honorable District Judge Joe B. McDade. The Appellant was convicted on the conspiracy charge and acquitted of money laundering. Before and during the trial the Court made evidentiary rulings concerning alleged hearsay testimony which are the subject of the Petitioner's Reason III for granting the Petition (TR

5/3/93, pp. 16-19; TR 5/4/93, pp. 53 76, 77) One of the defenses raised was a "multiple conspiracy" argument which is the subject of the Petitioner's Reason II for granting the Petition.

On September 30, 1993, the Petitioner was sentenced to a term of 262 months (21 years and 10 months) in the custody of the Attorney General. This sentence was calculated under the Federal Sentencing Guidelines. In making the

calculation, the Court denied Mr. Curtis' request for a two-level reduction for "acceptance of responsibility". (TR 9/30/93, pp. 77, 87) This ruling is the subject of the Petitioner's Reason I for granting this Petition.

On October 7, 1993, a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit pursuant to 18 USC §§1291 and 3742 was filed.

On September 29, 1994, the Court of

Appeals affirmed the Petitioner's conviction and sentence in an opinion published at 37 F3rd 301 (7th Cir., 1994)

II. PRE-TRIAL PROCEEDINGS

The Petitioner, a life-long resident of Tucson, Arizona, was one of five people named in an Indictment originally returned by the United States Grand Jury for the Central District of Illinois in May of 1992. Count One of that Indictment (No. 92-40028) alleged that

Mr. Curtis and the others had engaged in a conspiracy to distribute marijuana between approximately 1982 and 1988. Mr. Curtis was also alleged in a separate Count to have committed money laundering. On January 28, 1993, pre-trial hearings were held on the motions filed in that case, including the motions of Mr. Curtis and Martin Sax, the only remaining co-defendant, for separate trials based on a "multiple conspiracy" argument. The

motion for separate trial was granted, and the case against Mr. Sax proceeded to trial. (TR 1/28/93, p. 151)

After the cases against Mr. Curtis and Mr. Sax were severed, the Government sought and obtained a new Indictment (93-40006), which was returned on February 4, 1993. The principal difference in the Indictments had to do with the dates of the alleged conspiracy. In the earlier Indictment, the Government had alleged

that each of a series of individuals including (first Mr. Sax, then another defendant, and finally Mr. Curtis) who had supplied marijuana to two Illinois marijuana distributors were part of the same conspiracy even though Mr. Sax' participation had ended before Mr. Curtis' participation began. The new Indictment was limited in time to the dates of Mr. Curtis' alleged participation, and he alone was named as

the supplier to the illinois distributors. Count Two of the new Indictment repeated the money laundering allegation with no changes.

On February 17, 1993, before his being arraigned on the new Indictment, Mr. Curtis met in Tucson, Arizona with two agents from the task force that had been handling "Operation Adobe", as the investigation into the activities of the Illinois distributors had come to be

known. (TR 9/30/93, pp. 23-39) The purpose of this meeting was to make a "proffer" as part of plea negotiation with the goal of reaching a non-trial disposition under Rule 20 of the Federal Rules of Criminal Procedure. (Id., pp. 34, 45-46) [Under Rule 20 a case can be transferred from one District to another for a plea and sentencing if approved by the United States Attorneys in both Districts.] In this case, the approval

of the United States Attorney in the Central District of Illinois was conditioned on Mr. Curtis' expected cooperation with investigators in bringing further prosecutions. (Id., p. 46) After meeting with the investigators and, according to the case agent, truthfully describing his own involvement as alleged in the Indictment (TR 9/30/93, pp. 33, 38-39), Mr. Curtis decided not to continue to cooperate, and Rule 20

negotiations were abandoned. (Id., pp 45-46)

Prior to trial in the original Indictment Mr. Curtis had been released on bond, and was being supervised by the Pre-Trial Services office of the United Stated District Court in Tucson. He was directed to appear for an arraignment on the new Indictment on Peoria on March 15, 1993, and did so. At that time the Court directed that a further hearing be held

in Peoria on March 18, 1993, concerning the conditions of release. (TR 3/15/93, p. 14) Rather than appear at that hearing and remain released, Mr. Curtis turned himself in to the United States Marshal at the District Court in Tucson shortly before the hearing was to take place in Peoria. (TR 3/18/93, p. 16) He remained in custody throughout the remainder of the proceedings.

III. TRIAL

At the trial on the new Indictment the Government relied on the testimony of a series of witnesses who had entered into agreements with the Government to reduce the punishment for their own involvement in marijuana trafficking. The Government's position was that Mr. Curtis had supplied marijuana to two marijuana distributors in Illinois. (TR 5/3/93, pp. 31-34) One was Michael

Cutkomp, from the Quad Cities area of Illinois and Iowa; the other was Joseph Cullinane, from the Chicago area. (Id.) Mr. Cullinane testified himself (TR 5/4/93, pp 48-139; 219-308). Mr. Cutkomp did not testify, but his ex-wife, Karen, did. These two individuals, Joseph Cullinane and Karen Cutkomp, were the principal witnesses naming Mr. Curtis as the source of the marijuana that Mr. Cullinane and Mr. Cutkomp were receiving

and distributing in Illinois; they were also the witnesses who estimated the number of deliveries and quantities delivered.

Prior to trial, defense counsel advised the Court that he believed that much of the testimony the prosecution would seek to elicit from Karen Cutkomp would be hearsay, i.e., that she would be testifying as to what she was told by her then-husband Michael rather than as to

what she herself had seen. (TR 5/3/93, pp 16-19) The defense argument was that all statements made by one conspirator to another, even during the period of a conspiracy, are not necessarily excepted from the hearsay rule unless the statement is <u>also</u> made in furtherance of the conspiracy. (<u>Id</u>. p. 27) Since this was not directed at any particular statement, and since the question of admissibility would turn on the

circumstances of a particular statement, the issue was left by the District Court to be determined during her testimony. (Id., p. 19) During direct examination, Karen Cutkomp was allowed to testify repeatedly as to what she was told by Michael Cutkomp. After several objections when this line of questioning began, defense counsel requested a bench conference on this question; the Court's response was:

> I think we've gone through that before trial, and I am sure you're going to make that same objection, and I overruled it then and I am overruling it now. (TR 5/4/93, p. 77)

After that exchange counsel requested and was granted a continuing objection. (Id. p. 77) On cross-examination the context of these statements was brought out clearly in the following passage:

> Q: Now, when -- there's a number of times you've testified on direct that Mike would talk to somebody and then tell you what happened?

A: Yes.

Q: Was that kind of on the order of if Mike had had a regular, you know, 9:00 to 5:00 straight job, a guy would come home and tell his wife what happened at work today?

A: Mike would.

Q: Yeah. I mean those conversations with you were on like that. Right?

A: Yes.

Q: They weren't necessary to keep the marijuana conspiracy going?

A: No.

Q: It was just him letting you know what was going on?

A: Yes.

Q: And it wasn't like you were going to, it wasn't like he was asking you for -- to help him in the marijuana business by telling you these things?

A: No.

Q: All right. And the only time he sought your advice, he ignored it, the deal about the $60,000 with Rick Snider?

A: He was good at asking my opinion and then not using it.

Q: So it's not like he was

using you at his consigliere to find out how he should do things in the marijuana business?

A: Call it sounding board, is all.

Q: Just a guy coming home and talking ot his wife about what's going on in the business?

A: Yes.

An important point about the testimony of Joseph Cullinane is that although he knew Michael Cutkomp, and in fact Michael Cutkomp had introduced him

to Mr. Curtis as a supplier of marijuana and assisted him in obtaining his first load of marijuana from Mr. Curtis (TR 5/4/93, pp. 230-233), after that point their arrangements were separate and he (Joseph Cullinane) did not consider himself and Mr. Cutkomp to be "partners". (Id., pp. 290-291)

The primary argument on behalf of Mr. Curtis on the conspiracy count was to question whether the Government had

carried its burden of proof by presenting witnesses whose testimony was rendered so suspect by their own background and expected benefit. (TR 5/6/93, p. 65, e.g.) A secondary argument was that even if the witnesses were to be believed, the Government had merely proven two separate conspiracies, one between Mr. Curtis and Michael Cutkomp and another between Mr. Curtis and Joseph Cullinane, rather than a single conspiracy involving all three.

(Id., pp. 45-47) Mr Curtis did not testify, nor did he present witnesses to deny his involvement. He relied instead on the testimony of the Government witnesses themselves as to their criminal history and their agreement with the Government, and on the observations of the Government agents as to Mr. Curtis' ownership of a legitimate and very successful business. On the money laundering count, the defense argument

was that although a financial transaction had occurred between Mr. Curtis and Joseph Cullinane, it was not conducted with the alleged intent of furthering the marijuana conspiracy. (Id., p. 45) **The jury found Mr. Curtis "guilty"** of the marijuana conspiracy and "not guilty" of the money laundering count.

IV. SENTENCING

At sentencing issues were raised concerning the application of the Federal

Sentencing Guidelines.

On the issue of "acceptance of responsibility," Mr. Curtis pointed out that several months before trial he had met with investigators and truthfully admitted his involvement in the offense of conviction. (TR 9/30/93, p. 74, e.g.) The Court denied the requested reduction, relying not only on the fact that Mr. Curtis elected to go to trial, but also on his failure to appear at the March 18,

1993, hearing concerning conditions of release and the fact that the case agents had observed him at a movie and a restaurant with Martin Sax during late January, 1993, when the hearings on the original Indictment were being held. (TR 9/30/93, pp. 75-77)

REASONS FOR GRANTING WRIT

I. THE DISCREPANCY BETWEEN CIRCUITS ON THE QUESTION OF "ACCEPTING RESPONSIBILITY" WHERE A DEFENDANT HAS GONE TO TRIAL REQUIRES RESOLUTION BY THIS COURT.

In drafting the Federal Sentencing Guidelines, the United States Sentencing Commission identified the basic objective of the Congress in enacting the Sentencing Reform Act of 1984 to be "an effective, fair sentencing system" and noted that "Congress sought reasonable

uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." Introduction to Federal Sentencing Guidelines, Part A(3). In practice, disparity still occurs because different Courts of Appeal apply different standards to determine whether a given criminal defendant qualifies for a given "adjustment" which will increase or decrease his Base Offender Level,

thereby increasing or decreasing his sentence. This case presents an excellent example.

In this case, the District Court rejected Mr. Curtis' argument that he should be given a downward adjustment of two levels for "acceptance of responsibility" pursuant to Section 3.E of the Guidelines because even though he had gone to trial, he had previously made a full confession and had not offered any

testimony at trial. Although he had failed to appear at the March bond hearing, Mr. Curtis had done so in the unusual context of simply "giving up" on pre-trial release by going to jail rather than contesting the conditions of release. The District Court denied the request for a downward adjustment.

The effect of that denial was to leave his Guideline range at 262 to 327 months, rather than 210 to 262 months. The

difference in the minimum recommended sentences was 52 months, or 4 1/3 years.

The decision of the District Court was reviewed by one of the strictest Courts of Appeals in the nation on that subject, the United States Court of Appeals for the Seventh Circuit. In an opinion published by that Court a week after Mr. Curtis' appeal was argued, United States v. Gomez, 24 F. 3rd 924 (7th Cir., 1994) that Court scoffed at an

appellant who sought review of the denial of his request for a downward adjustment for "acceptance of responsibility" after going to trial, and threatened sanctions for his lawyer for a "frivolous appeal." In so doing the Court characterized the reduction as a "reward for a guilty plea," and noted that it had "never directed a district judge to award this reduction for a post-trial change of heart - indeed has never directed a

district judge to award the reduction even when the defendant pleaded guilty well in advance of trial." 24 F3rd at 926. Even in Gomez, the Court noted the theoretical possibility of a post-trial adjustment of responsibility where the defendant "admitted the charged conduct." 24 F3rd at 926. Nevertheless, the Gomez opinion represents a candid portrait of the Seventh Circuit's view on this issue. It is therefore not surprising that in

Mr. Curtis' case, the Court of Appeals rejected the argument that a challenge to the sufficiency of the Government's case did not qualify for an exception to the general rule against post-trial "acceptance of responsibility" reductions.

The strictness of the Seventh Circuit is not universal. The Court of Appeals for the Ninth Circuit, which includes the District of Arizona, where

Mr. Curtis resided throughout the period of the conspiracy, is markedly different. In United States v. McKinney, 15 F3rd 849 (9th Cir. 1994), that Court began its analysis of this issue by stating:

"A defendant is not required to plead guilty to receive the acceptance of responsibility reduction." 15 F3rd at 850. This beginning point contrasts strongly with the Seventh Circuit's Gomez opinion, which starts by stating that the

reduction "is designed as a reward for a guilty plea," and characterizes the appeal as "surprising." The Ninth Circuit went on to note:

> "Indeed, were a defendant required to plead guilty to be entitled to the reduction, the sentencing guidelines would penalize the exercise of the constitutional right to go to trial." citing, United States v. Johnson, 956 F2d 894, 904 (9th Cir., 1992). 15 F3rd at 850.

The most telling contrast is that the Ninth Circuit describes the example offered by the Application Notes to

Section 3 E 1.1 of the Guidelines (where a defendant admits factual guilt but goes to trial to make a constitutional challenge or to challenge the applicability of a statute to his conduct) as a mere example "not intended to be exhaustive," 15 F3rd at 851, whereas the opinions of the Seventh Circuit in Gomez, supra, and the instant case make it clear that that Circuit views the Application Note as setting a

very narrow exception.

In sum, it appears that if Mr. Curtis had been tried or sentenced in the part of the country where he had lived all his life and where his alleged criminal acts occurred, his sentence might well have been four years shorter. The Sentencing Reform Act was drafted to discourage such inequalities, and the Court should use this case as a vehicle to correct such problems.

II. IN DECIDING THE "MULTIPLE CONSPIRACY" ISSUE THE COURT OF APPEALS APPLIED A STANDARD CONTRARY TO LAW.

The Court of Appeals made two findings on the "multiple conspiracy" issue. First, it found that there were facts that would support the jury's conclusion, despite the fact that no single conspiracy was perceived by the participants (see Reason III below), based on evidence about the "genesis and evolution" of the distribution scheme,

and the assertion that Mr. Curtis "ordinarily" sent deliveries to both customers on the same truck. 37 F3rd at 304-306. The Petitioner challenges this finding, which is necessarily very fact-specific. For instance, the evidence was that only a few single loads containing marijuana for both customers were sent at the end of the time frame, and that in the years before that there were no such joint deliveries. Again, such questions

are quite fact-specific and would be addressed in detail if the Court accepts certiorari. For the purposes of this Petition, the Petitioner simply wishes to make it clear that this finding is challenged.

The second finding was that the Court of Appeals went on to say that there "could be no prejudice" because Mr. Curtis was alleged to be at the "hub" of both conspiracies. 37 F3rd at 306. In

essence the Court of Appeals has decided that even if the prosecution has not proven that a defendant committed the crime he was alleged to have committed, that does not matter if he is shown to have committed some other crimes. The Court even stated that a multiple-conspiracy instruction is usually unnecessary in this situation. 37 F3rd at 306.

The problem of prejudice is the

issue in all multiple-conspiracy cases, Cf. Kotteakos v. United States, 328 U.S. 750, 752 (1946) but the fact that a defendant is the only one on trial, or is the one accused of being the "hub", does not preclude a finding of prejudice, nor does it reduce the need for a search for prejudicial effects. The likelihood of jury confusion is equally present where as here different witnesses have to do with the supplier's dealings with one

recipient and not another; the nature of the supplier's relationship to one recipient may be clear and direct (such as it was between Mr. Curtis and Mr. Cullinane) whereas his relationship to another may be through vague hearsay (such as Karen Cutkomp's testimony concerning Mr. Curtis and Michael Cutkomp). The direct testimony about one relationship could spill over and affect the jury's evaluation of the hearsay

testimony of the other. Most importantly, in a system where the sentence for a drug-distribution offense is determined by the amount distributed, the prejudice is undeniable.

In sum, this Court should grant this petition so that it can clarify that the multiple-conspiracy question can be raised by someone who is in Mr. Curtis' position.

III. IN ADMITTING HEARSAY STATEMENTS BY A CO-CONSPIRATOR, THE COURT DID NOT CORRECTLY APPLY THE "IN FURTHERANCE" REQUIREMENT

On the question of the admissibility of the out-of-court statements by Michael Cutkomp, it is clear that the District Court applied the "during" test commonly argued for by prosecutors, i.e. that if a conspirator said something during the period of a conspiracy, that statement is admissible. The Court of Appeals recognized that that was not enough under

Rule 801, and that the statement must also be made "in furtherance of" the goals of the conspiracy. Once again, however, the Court of Appeals substituted its conclusion for the conclusion of the actual participants; just as Mr. Cullinane's inconvenient testimony that he did not consider himself and Michael Cutkomp to be partners was overlooked in order to support the finding of a single conspiracy, Karen Cutkomp's testimony

that the statements to her by her husband that Mr. Curtis was sending marijuana to them did not further the conspiracy was overlooked in favor of speculation as to how such statements could have furthered the conspiracy. As with the "acceptance of responsibility" issue, it again appears that other Courts of Appeal, including the one where Mr. Curtis lived and was alleged to have committed his criminal activity, have positions on this

issue that are more favorable to defendants by imposing stricter limits of admissibility.

In United States v. Wood, 834 F.2d 1382 (8th Cir., 1987) the Court held that when a conspirator was "merely informing his wife about his activities," the "in furtherance" test was not met. Id., at 1385. In United States v. Eubanks, 591 F.2d 513 (9th Cir., 1979) the United States Court of Appeals for the Ninth

Circuit had to deal with this question in the context in which it is presented here. The Government's "star witness" in a heroin distribution conspiracy was a woman whose deceased common-law husband had made various statements to her about the conspiracy, and she had "at least a passive role in the conspiracy." Id. at 518. Nevertheless, the Court of Appeals ruled that statements by him to her about people he spoke to on the telephone, or

where he was going to meet whom, were no more than a "casual admission of culpability to someone he had individually decided to trust," and that "he was merely informing his common-law wife about his activities." Id. at 520. The convictions of various people incriminated by this hearsay were reversed.

In sum, this Court should use this case to make it clear that the "in

furtherance" requirement of Rule 801(d)(2)(E) of the Federal Rules of Evidence must be taken seriously.

CONCLUSION

For all the reasons set forth above, the Petitioner respectfully requests that this Court grant his Petition.

SIGNED this 28 day of December, 1994.

Peter B. Keller
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JEFFREY P. CURTIS
PETITIONER,
VS.
UNITED STATES OF AMERICA,
RESPONDENT.

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 93-3447

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY PAUL CURTIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Rock Island Division.
No. 93 CR 40006—Joe B. McDade, *Judge.*

ARGUED MAY 9, 1994—DECIDED SEPTEMBER 29, 1994

Before MESKILL,* FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* Jeffrey Paul Curtis was sentenced to 262 months imprisonment after a jury found him guilty of conspiracy to distribute marijuana and acquitted him of a companion charge of money laundering. On appeal, Curtis raises four arguments: (1) that the district court erred in admitting hearsay statements of a co-conspirator; (2) that the evidence presented at trial was insufficient to prove a single conspiracy; (3) that the court erred in

---

* The Honorable Thomas J. Meskill of the United States Court of Appeals for the Second Circuit is sitting by designation.

imposing a sentence enhancement for obstruction of justice; and (4) that the court erred in denying a reduction for acceptance of responsibility. We affirm.

I.

In May 1992, Curtis and four others were charged with conspiracy to distribute marijuana between 1982 and 1988 and money laundering. Two of the defendants were alleged to have been involved as distributors throughout the period while the other three were thought to have participated as successive suppliers. Three of the defendants entered into plea agreements, and in January 1993, the district court granted Curtis' pre-trial motion to sever his trial from that of the remaining co-defendant, Martin Sax, whom the government contended was the original supplier. The government then sought and obtained a new indictment against Curtis in February 1993, charging the same two violations but limiting the dates of the alleged conspiracy to the years in which Curtis was the supplier.

Curtis remained out of custody while awaiting trial on the original indictment and appeared in Peoria for arraignment on the new indictment on March 15, 1993. At that time the court scheduled a further hearing for March 18 to discuss the conditions of release. Curtis failed to appear in Peoria as directed on the 18th; instead he turned himself in that day to the United States Marshal in Tucson, Arizona. On account of Curtis' disobedience, the court ordered him to remain in custody throughout trial and sentencing.

At trial the government called several witnesses who testified that Curtis had supplied substantial amounts of marijuana to two major Illinois distributors, Mike Cutkomp and Joe Cullinane, from 1986 to 1989. The government's key witnesses were Cullinane himself and Mike Cutkomp's former wife, Karen. Cullinane testified that Cutkomp had introduced him to Curtis and helped facilitate their initial transaction in 1986. For some time thereafter Cullinane used his own couriers to transport the marijuana from

Arizona to Illinois, but later received his deliveries from Curtis' trucks. Cullinane asserted that after the initial transaction, his arrangements with Curtis were conducted separately from Cutkomp's and that the two Illinois dealers did not consider themselves to be partners. One of Cullinane's couriers, Ron Witt, testified that he had driven several truck-loads of marijuana supplied by Curtis for distribution in Illinois. Witt was aware that Curtis was supplying marijuana to both Cullinane and Cutkomp.

At trial Karen Cutkomp testified to statements made to her by her husband during the course of the alleged conspiracy. Curtis objected to the admission of these statements, which he contended were not made in furtherance of the conspiracy, but the court overruled the objection and allowed the testimony. Karen Cutkomp also testified that while she and her then-husband were en route to Mexico (attempting to remain a step ahead of law enforcement authorities) they met with Curtis in Tucson and turned over to him approximately $225,000 in marijuana proceeds that Curtis later delivered to a man in Nogales, Arizona, according to their instructions. In addition, Karen Cutkomp's mother, Rosina Jech, testified that she had served as a drug courier between Tucson and the Quad Cities area and had been introduced to Curtis in Tucson through Mike Cutkomp.

Curtis neither testified nor presented witnesses on his own behalf. He did, however, make a statement to investigators on December 13, 1990. At that time, Curtis admitted that Marty Sax had introduced him to Mike Cutkomp and that he knew that Cutkomp was a fugitive. Curtis denied having any correspondence or business dealings with Cutkomp, though he recalled meeting Rosina Jech and Joe Cullinane and stated that his business had access to trucks. Curtis' trial strategy relied on two principal arguments. First, he hoped that the jury would discount the testimony of the key witnesses against him on the basis of their own criminal conduct and a perception that their credibility might be tainted by their obvious incentive to curry favor with the prosecution. Second, he argued that

the government had proven two separate conspiracies (Curtis-Cutkomp and Curtis-Cullinane) rather than one all-encompassing conspiracy (Curtis-Cutkomp-Cullinane).

At the jury instruction conference, Curtis successfully argued for the inclusion of Defendant's Instruction No. 1, which stated:

> Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more persons. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.
>
> To find the defendant guilty, you must find that he was a member of the conspiracy charged in the indictment.

The jury returned a verdict of guilty on the conspiracy to distribute marijuana charge, and a verdict of not guilty on the money laundering charge.

At sentencing, the court imposed a two-level upward adjustment for obstruction of justice, U.S.S.G. § 3C1.1, and denied Curtis' request for a two-level reduction for acceptance of responsibility. U.S.S.G. § 3E1.1. The court sentenced Curtis to 262 months imprisonment, the lowest possible sentence within the applicable guideline range.

II.

A.

We turn first to Curtis' argument that an impermissible variance existed between the indictment and the proof at trial. Specifically, Curtis contends that while a rational jury may have concluded that he had supplied a large quantity of marijuana to both Cullinane and Cutkomp, there was

insufficient evidence to link all three in a single conspiracy. Drawing upon this court's decisions in *United States v. Townsend*, 924 F.2d 1385 (7th Cir. 1991) and *United States v. Napue*, 834 F.2d 1311 (7th Cir. 1987), Curtis maintains that no single overarching scheme existed because his arrangement with Cullinane was separate from and not in any way dependent upon the agreement he made with Cutkomp. In response, the government asserts that Cullinane and Cutkomp had acted in concert long before Curtis became their supplier and continued to receive joint shipments from Arizona at various points during the purported Curtis-Cullinane-Cutkomp conspiracy. Moreover, the government suggests that several additional pieces of evidence—the number of long distance telephone calls between the three parties, the size of the marijuana shipments (on occasion over 1,000 pounds) and the fact that Cullinane absorbed an entire shipment after Cutkomp fled to Mexico as a favor to Curtis—give rise to an inference of mutual support and dependence. Curtis responds that the permissible inferences to be drawn from the evidence extend no further than that Cullinane and Cutkomp knew each other, talked on the phone, and had the same type of business relationship with Curtis.

A defendant asserting a claim of variance will succeed in obtaining reversal of his conviction only if he establishes that (1) the evidence presented at trial was insufficient to support the jury's finding of a single conspiracy, and (2) he was prejudiced by the variance. *See United States v. Testa*, Nos. 92-2037, et al., slip op. at 4 (7th Cir. Aug. 17, 1994); *Townsend*, 924 F.2d at 1390; *see also* Fed. R. Crim. P. 52(a). We have stated on numerous occasions that the jury gets "first crack" at deciding "whether there is one conspiracy or several when the possibility of a variance occurs," *see e.g., United States v. Nava-Salazar*, Nos. 91-1003 et al., slip op. at 10 (7th Cir. Jul. 13, 1994); *United States v. Paiz*, 905 F.2d 1014, 1019 (7th Cir. 1990), *cert. denied*, 499 U.S. 924 (1991), because a question of variance is a question of fact within the jury's realm of expertise. *Paiz*, 905 F.2d at 1019. Where, as here, the parties argued

and the jury was instructed as to the dispute concerning the number of possible conspiracies, our initial inquiry simply becomes one of the sufficiency of the evidence. Thus, we view the evidence most favorably to the government, and we uphold a jury's factual conclusion that a single conspiracy existed if *any* rational trier of fact could have found, beyond a reasonable doubt, the one conspiracy. *United States v. Emenogha*, 1 F.3d 473, 480 (7th Cir. 1993) (citations omitted). Finally, even if we do not find sufficient evidence of a single conspiracy, the variance will be fatal to the government's case only if the defendant can demonstrate prejudice. *Townsend*, 924 F.2d at 1410. This additional requirement reflects the understanding that "[t]he crime of conspiracy focuses on agreements, not groups;" accordingly, the government "need only prove that the defendant joined the agreement alleged," and need not establish the group of coconspirators with whom the defendant joined. *See Testa*, slip op. at 4 (citing *Townsend*, 924 F.2d at 1389)).

In this case, the government does not present strong direct evidence of a common scheme or agreement involving all three men—for example, evidence showing that Cullinane and Cutkomp drew support from or depended in some way upon the success of each other's distribution networks. However, as we have noted previously, we need not limit our search to *direct* evidence. *Townsend*, 924 F.2d at 1390; *United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990). The "elastic and sprawling" nature of drug (and other) conspiracies, *see Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring), often requires juries to sort, weigh, and draw conclusions from circumstantial evidence and limits the likelihood that a "smoking gun" will be found that implicates all who have been charged. In these circumstances, the critical question becomes "whether the jury may reasonably *infer* a single agreement among the defendants from the evidence of the drug transactions presented by the government." *Townsend*, 924 F.2d at 1390.

We agree with Curtis that the evidence arguably establishes multiple conspiracies, but we may not find a variance unless *no* reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment. Here we are persuaded that the circumstantial evidence, though relatively weak in its component parts, was sufficient to permit an inference of a single overarching agreement when viewed cumulatively. Examining the evidence in the light most favorable to the government, as we must, we believe that the jury could have found a unitary Cullinane/Cutkomp/Curtis conspiracy on the basis of the evidence presented about the genesis and evolution of the drug distribution network. Cullinane and Cutkomp had a long relationship of conspiring to distribute marijuana that was marred by an inconsistent supply. Cutkomp was the first to discover Curtis as a potentially stable source, and, satisfied with his performance, recommended Curtis to Cullinane. Furthermore, Cutkomp introduced Cullinane to Curtis in Tucson and even helped package and load the initial quantity of marijuana sold by Curtis to Cullinane. Thereafter the three men remained in contact (as evidenced by the phone records) and Curtis ordinarily sent single trucks from Arizona to make two deliveries, one to Cutkomp in the Quad Cities and the other to Cullinane in the Chicago area. After Cutkomp fled to Mexico, however, Cullinane received full loads for a short time (because half was no longer being unloaded in the Quad Cities), but he soon terminated the arrangement because undertaking to resell full loads caused him to bear too much risk. Thus, the jury could have inferred that the enterprise collapsed once Cutkomp could no longer participate. Though the sum of this evidence does not produce the most compelling case for the existence of a single overarching conspiracy, we conclude that it crosses the rather low threshold that it must to withstand appellate review.

Even if we were to assume that no rational jury could have found a single conspiracy as alleged in the indictment, the resulting variance would have been harmless

error as it would not have unfairly denied Curtis of a fair trial and sentencing. As we have observed on several occasions, the Supreme Court has looked to the following factors to determine whether prejudice has resulted from a variance between indictment and proof: (1) surprise to the defendant resulting from the variance, (2) possibility of subsequent prosecution for the same offense, (3) likelihood of jury confusion as measured by the number of conspirators charged and the number of separate conspiracies proven, and (4) likelihood of jury confusion in light of the instructions giving the jury limiting or excluding the use of certain evidence not relating to a particular defendant. *See, e.g., Townsend*, 924 F.2d at 1410-1411; *United States v. Lindsey*, 602 F.2d 785, 787-788 (7th Cir. 1979). To this list we have added the possibility of prejudice arising from introduction of co-conspirator hearsay evidence and from an enhanced sentence computed on the basis of the drug-related activities of others with whom the defendant did not conspire. *United States v. Aquilla*, 976 F.2d 1044, 1052 (7th Cir. 1992); *Townsend*, 924 F.2d at 1412. At the same time, however, we have noted that the need to precisely distinguish between a single conspiracy and multiple conspiracies diminishes considerably where, as here, the defendant is the common link between the alleged coconspirators. *See United States v. Flood*, 965 F.2d 505, 509 (7th Cir. 1992); *United States v. Noble*, 754 F.2d 1324, 1330 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985); *see also United States v. Johnson*, Nos. 93-3056 et al., slip op. at 4 (7th Cir. Aug. 9, 1994) ("There is little, if any, need for a multiple conspiracy instruction when the defendants are at the hub of the various possible agreements."); *Napue*, 834 F.2d at 1333 ("Even if there were two conspiracies, [where the defendant is the hub of these conspiracies] it is usually not necessary to explore the ways in which the plan might be recast as a series of more limited agreements.").

Applying these principles to the facts of this case, there could be no prejudice. Curtis was the only person on trial, thus eliminating the customary concern with jury confusion resulting from the "spillover" effect associated with

simultaneously trying multiple defendants with various connections to the purported scheme. In addition, the evidence clearly demonstrated that Curtis operated as the common supplier to both Cullinane and Cutkomp throughout the time period charged in the indictment. As we explained in *Flood*, this evidence, placing Curtis at the hub of the conspiracy, means that his actions are viewed in a different light than those of his confederates. Though Cullinane or Cutkomp might plausibly have argued that *they* "lacked knowledge of the reach or likely reach of the conspiratorial network," *Flood*, 965 F.2d at 509 (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)), Curtis surely knew all of the important details—to whom he was selling and in what amounts—and he therefore was not prejudiced by the admission of statements made by his co-conspirators or by having his sentence calculated according to the quantity he sold to both Cullinane and Cutkomp.

B.

Curtis next argues that the district court improperly admitted into evidence, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, testimony of Karen Cutkomp relating to conversations she had with her husband during the course of the alleged conspiracy. Curtis objected to this testimony both before and during trial, and the court granted a continuing objection after overruling two specific objections during the government's direct examination.

Statements by a co-conspirator may be introduced against other conspirators if the government demonstrates that: (1) a conspiracy existed; (2) the defendant and the declarant were members thereof; and (3) the offered statement was made during the course of and in furtherance of the conspiracy. *United States v. Robinson*, 956 F.2d 1388, 1394 (7th Cir. 1992) (citations omitted). We review a district court's findings with respect to these elements for clear error. *Id.* This means that we will not disturb the trial court's ruling if a reasonable basis exists for concluding that the statements furthered the conspiracy, even if an

alternative explanation is equally plausible. *See Garlington v. O'Leary*, 879 F.2d 277, 284 (7th Cir. 1989); *United States v. Molinaro*, 877 F.2d 1341, 1345 (7th Cir. 1989).

Curtis appears not to contest the first two prongs of the inquiry; rather he insists simply that Karen Cutkomp's statements did not satisfy the "in furtherance" requirement. In *United States v. Johnson*, we stated that Rule 801(d)(2)(E) is a "*limitation* on the admissibility of co-conspirators statements that is meant to be taken seriously." 927 F.2d 999, 1001 (7th Cir. 1991) (citing *Garlington*, 879 F.2d at 283). We explained further that the "in furtherance" requirement would be satisfied where the statement is "part of the information flow between conspirators intended to help each perform a role," and provided as examples statements made to "recruit other conspirators, control damage to an ongoing conspiracy or keep conspirators advised about the progress of the conspiracy." *Johnson*, 927 F.2d at 1002. At the other end of the spectrum, we noted that "mere idle chatter, narrative declarations, and superfluous casual remarks" do not constitute statements "in furtherance" of a conspiracy. *Id.*

Curtis calls our attention to a particular exchange during his counsel's cross-examination of Karen Cutkomp that, he suggests, belies the notion that Mike Cutkomp's statements to Karen Cutkomp were made "in furtherance" of the conspiracy. The dialogue went as follows:

> Q. Now, when—there's a number of times you've testified on direct that Mike would talk to somebody and then tell you what happened?
>
> A. Yes.
>
> Q. Was that kind of on the order of if Mike had had a regular, you know, 9:00 to 5:00 straight job, a guy would come home and tell his wife what happened at work today?
>
> A. Mike would.
>
> Q. Yeah. I mean those conversations with you were on like that. Right?

A. Yes.

Q. They weren't necessary to keep the marijuana conspiracy going?

A. No.

Q. It was just him letting you know what was going on?

A. Yes.

Q. And it wasn't like you were going to, it wasn't like he was asking you for—to help him in the marijuana business by telling you these things?

A. No.

Q. All right. And the only time he sought your advice, he ignored it, the deal about the $60,000 with Rick Snider?

A. He was good at asking my opinion and then not using it.

Q. So it's not like he was using you as his consigliere to find out how he should do things in the marijuana business?

A. Call it sounding board, is all.

Q. Just a guy coming home and talking to his wife about what's going on in the business?

A. Yes.

Trial Tr. 5/4/93, pp. 114-115. The witness' own general characterizations of the nature of her testimony, however, cannot obscure the more specific details of her direct examination that indicate a greater import to the statements at issue. For example, in view of the fact that Karen Cutkomp's mother transported the marijuana from Arizona to the Quad Cities on numerous occasions, we find it likely that Mike Cutkomp's statements to Karen about the transportation arrangements were not merely dinnertime conversation between husband and wife, but rather were made to relate the need for Karen's mother to remain in-

volved in the conspiracy. Likewise, Mike Cutkomp's statements to his wife about the substance of telephone calls he had made from Mexico to Curtis most likely were made to advise her of the extent to which law enforcement authorities appeared to have caught wind of the conspiracy and of the likelihood of their being able to return to the Quad Cities, or the United States generally. Curtis does not protest any other specific statements, though both at trial and appeal he registered his general objection to the entire line of inquiry. Based on our review of the record, we cannot conclude that the district judge committed clear error in admitting Karen Cutkomp's testimony in its entirety, and accordingly we do not disturb his rulings.

C.

With respect to sentencing, Curtis first appeals the district court's decision to apply a two-level enhancement to his base offense level for obstruction of justice. U.S.S.G. § 3C1.1. We review this determination for clear error, *United States v. Brown*, 944 F.2d 1377, 1379 (7th Cir. 1991), meaning that we will reverse only if we reach a "firm and definite conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989).

U.S.S.G. § 3C1.1 states in its entirety:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by two levels.

As the Application Notes explain, this enhancement applies to "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding, . . . or attempting to do so," Note 3(d), and to "willfully failing to appear, as ordered, for a judicial proceeding." Note 3(e). Furthermore, under § 3C1.1, "the de-

fendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused." Note 7.

In this case, the only relevant conduct giving rise to the enhancement was Curtis' role in receiving from the Cutkomps approximately $225,000 in drug proceeds, temporarily concealing that money, and later releasing the funds to a courier in Nogales, Arizona, pursuant to directions from the Cutkomps. In *Brown*, we upheld an enhancement for obstruction of justice where the defendant himself turned over the proceeds of marijuana sales to another person "for safekeeping" after the defendant became aware that he was the subject of a criminal investigation. 944 F.2d at 1383. Curtis argued, and the district court agreed, *see* Sent. Tr. at 81, that *Brown* was silent as to whether the person who *received* the money also qualifies for the enhancement. However, explicitly relying on Application Note 7, the court found that Curtis accountable for obstruction of justice on an aiding and abetting theory. On appeal, Curtis states that he often received large payments from Cullinane and Cutkomp and suggests that the receipt of the $225,000 was "as likely to be simply another act in furtherance of the conspiracy and *not* an act designed to conceal its existence." This argument is not persuasive. Even if we accept that Curtis frequently received large sums of cash from his co-conspirators, as payment for marijuana, this does not explain why Curtis subsequently turned the money over to a third party at a location along the U.S.-Mexico border for return to the purported purchaser. The much more likely conclusion, and the one drawn by the district court, is that Curtis knew that the Cutkomps were "on the lam." In these circumstances, we find the enhancement for obstruction of justice to be appropriate.

D.

Curtis also contends that the district court erred in denying Curtis' request for a two-level reduction for acceptance of responsibility. U.S.S.G. § 3E1.1. Because this issue pre-

sents a factual question, depending largely on credibility assessments of the sentencing judge, we give great deference to the district court's reasoned conclusion and reverse only for clear error. *See United States v. Guadagno*, 970 F.2d 214, 224 (7th Cir. 1992); U.S.S.G. § 3E1.1 Application Note 5.

Under § 3E1.1, a defendant is entitled to a reduction of his sentencing exposure only if he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." *United States v. Rivero*, 993 F.2d 620, 622-623 (7th Cir. 1993). As the Commentary and Application Notes make clear, only in "rare situations" may a defendant clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. *See* Application Note 2. We have noted that the "rare situation" envisioned by the Sentencing Commission involves a defendant who concedes his factual guilt (i.e. that he has engaged in the charged conduct) before trial, but challenges the general content or specific application of a statute. *See Rivero*, 993 F.2d at 624; *Guadagno*, 970 F.2d at 226.

The district court relied on several factors in determining that Curtis had not accepted responsibility for his criminal conduct: (1) Curtis chose to go to trial rather than pleading guilty (at least to Count I); (2) Curtis violated the conditions of his pre-trial release by failing to appear at a scheduled court appearance and by having contact with his one-time co-defendant, Martin Sax; and (3) its determination that Curtis had obstructed justice, a finding that except in extraordinary cases, *see* U.S.S.G. § 3E1.1 Application Note 4, indicates that a defendant has not accepted responsibility. Sent. Tr. at 75-77. Curtis contests each of the rationales for the district court's conclusion. He posits first that the jury's verdict of acquittal vindicated his decision to go to trial on Count II. The decision to go to trial on Count I, he insists, did not represent a denial of guilt; rather he simply wished to preserve a

technical legal issue—whether the conduct to which he admitted constituted one or two conspiracies—while conceding that he committed the acts for which he stood accused. With respect to the failure to appear, Curtis suggests that his actions did not evidence an avoidance of responsibility so much as they reflected an avoidance of Peoria. In essence, Curtis asks us to view his unilateral decision to turn himself in to authorities in Tucson as irrelevant to the applicability of § 3E1.1. Finally, Curtis argues that the unique facts of this case—the behavior giving rise to the obstruction penalty occurred long before the indictment and Curtis admitted his involvement in a timely fashion relative to the date of his indictment—present one of the rare circumstances in which a reduction for acceptance of responsibility may be reconciled with an enhancement for obstruction of justice.

Like the district court, *see* Sent. Tr. at 75, we find Curtis' arguments interesting, though ultimately unpersuasive. The Sentencing Guidelines explicitly state that the acceptance of responsibility reduction is available only in "rare" or "extraordinary" circumstances if a defendant either puts the government to its burden of proof at trial *or* is determined to have obstructed justice. *See* U.S.S.G. § 3E1.1 Application Notes 2 and 4. Accordingly, a defendant like Curtis, who has both gone to trial *and* obstructed justice, must overcome quite a strong presumption to convince a court that he still is entitled to a reduction for acceptance of responsibility. We conclude that he has not done so. Curtis went to trial on Count I not to contest the constitutionality or applicability of a statute, but rather because he thought there was a variance between the indictment and the proof. We have characterized a variance as a challenge to the sufficiency of the evidence, *see Testa* slip op. at 4, and we find no indication, either in the Guidelines themselves or in the case law, that this type of claim falls within the "rare situations" exception contemplated in Application Note 2. We also believe that Curtis' violations of the conditions of his pre-trial release and his failure to appear at a hearing after receiving notice thereof re-

flect negatively on the extent of Curtis' acceptance of responsibility for his criminal conduct and affirmatively demonstrate the limits of his rehabilitative efforts. The district court appropriately considered these transgressions and the circumstances surrounding Curtis' decision to go to trial on Count I in concluding that Curtis was not entitled to a reduction under § 3E1.1.

III.

For the foregoing reasons, we affirm Curtis' conviction and sentence.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—9-29-94